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(3)

No. 07-110

FILED
DEC 3 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

A. J. ARAVE,

Petitioner,

v.

MAXWELL HOFFMAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S MOTION TO VACATE DECISION BELOW AND DISMISS THE CAUSE AS MOOT

JOAN FISHER
FEDERAL DEFENDER
SERVICES OF IDAHO
317 West Sixth St., Ste. 204
Moscow, ID 83843
(208) 883-0180

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent Maxwell Hoffman moves the Court to issue an order (a) vacating the judgment of the Court of Appeals under review, which required "the district court to direct the State to release Hoffman unless, within a reasonable time from the date of this opinion, the State offers Hoffman a plea agreement with the same material terms offered in the original plea agreement" (Pet. App. 32), and (b) dismissing this cause as moot. In support of this motion, Respondent shows as follows:

1. On March 30, 2002, the United States District Court for the District of Idaho issued a judgment vacating Respondent's sentence of death on grounds of ineffective assistance of counsel with respect to his capital sentencing, and requiring the State of Idaho to conduct resentencing proceedings within 120 days. Pet. App. 38, 65. At the same time, the District Court denied the respondent's claims that he was entitled to additional and further relief on other constitutional grounds, including the relief required by the portion of the Court of Appeals judgment under review in this Court. *See* Pet. App. 39 *et seq.*

2. Both sides appealed the District Court's decision, but "[t]he State subsequently withdrew its cross-appeal, leaving in place the district court's order granting the habeas petition as to the sentencing

phase." Pet. App. 7. The withdrawal of the cross-appeal meant that resentencing proceedings[1] would be required, whatever the outcome of the remaining appeals.

3. On October 23, 2006, trial counsel was appointed by the Third Judicial District Court of the State of Idaho, Owyhee County, to represent Respondent at the District Court-ordered capital resentencing proceedings.[2] That counsel suffered from a conflict of interest, and new counsel was appointed on February 14, 2007. Since that time, new trial counsel has been preparing for resentencing, and a status conference is now set for December 13, 2007, before Idaho Third District Judge Hon. Gregory M. Culet.

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[1] Since the District Court's order, there have been fundamental changes in the Idaho law governing capital sentencing, including the addition of a requirement that juries determine both sentencing eligibility and sentencing. *See* Idaho Code 19-2515.

[2] *See* I.C. 19-2515(5)(c). The Order appointing counsel stated that "[r]ather than wait until such time as this Court receives the final directive from the Federal Court, this Court has determined that it will appoint qualified death penalty trial counsel now to both commence preparation for the eventual return of this case to the trial court level, as well as engage in negotiations with the Owyhee County Prosecutor (and possibly with the Idaho Attorney General, if the Attorney General is still assisting the Owyhee County Prosecutor at the trial level) regarding reaching a possible settlement of the case." Order of October 23, 2006 at 1-2 (copy attached to this Motion as Exhibit 1).

4. Although these state proceedings are ongoing and Respondent's sentence of death has been ordered vacated by the United States District Court, he remains confined under "death-sentenced" conditions.[3] These conditions are so onerous that they are the subject of an Eighth Amendment challenge filed on Respondent's behalf in the United States District Court for the District of Idaho. *Hoffman v. Killeen et al.*, CV 02-291-S-BLW. Despite the pendency of his civil action and the state court resentencing proceedings, Idaho Corrections practices require that Respondent continue to be confined under these harsh conditions at least until the resolution of the present proceedings in this Court and the entry of final judgment in the District Court.

5. After extensive consultations with counsel, Respondent has decided that he no longer seeks or desires the relief ordered by the Court of Appeals with respect to the plea offer. He therefore wishes to withdraw his claim of ineffective assistance of counsel in connection with plea bargaining and dismiss his appeal on that issue in the Court of Appeals below, in order to proceed with resentencing without further delay. He therefore requests an order

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[3] Mr. Hoffman's "death-sentenced" status means that his conditions, though not "death row," permit only 2-4 hours per day out-of-cell time and preclude access to the ball field and a kitchen job. These conditions are inconsistent with, and more restrictive than, his actual custody level at which he would be placed at the medium security facility.

promptly vacating this aspect of the Court of Appeals' judgment. Respondent's trial and habeas counsel fully concur with his decision.

6. Because Respondent agrees with and requests exactly the same relief now sought by the petitioner in this matter, the parties are in agreement regarding the proper disposition of the case, and there is no live case or controversy before this Court. Under such circumstances, dismissal is appropriate, with instructions to the lower courts to dismiss, with prejudice, the relevant claim. *Webster v. Reproductive Health Services*, 492 U.S. 490, 512 (1989); *Deakins v. Monaghan*, 484 U.S. 193, 200-01 (1988); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

For all these reasons, Respondent asks the Court to issue forthwith an order (1) vacating that portion of the Court of Appeals decision below which required the District Court to grant the writ unless the State offers respondent a plea agreement (Pet. App. 32); (2) instructing the lower courts to dismiss those portions of Respondent's petition and appeal which seek that relief, with prejudice; and (3) dismissing this case as moot.

Respectfully submitted,

FEDERAL DEFENDER
SERVICES OF IDAHO

JOAN M. FISHER
Attorney for Respondent

EXHIBIT 1

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

THE STATE OF IDAHO, Plaintiff, vs. MAXWELL HOFFMAN, Defendant.	CASE NO: CR-4843 ORDER APPOINTING DEATH PENALTY-QUALIFIED TRIAL COUNSEL (Filed Oct. 23, 2006)

Comes now to the above entitled Court and notes as follows:

1. The defendant in the above-entitled cause has previously been sentenced to death.

2. There are various appeals currently pending in the Federal 9th Circuit, but both the state and the defense acknowledge that at the minimum, this case will be returned by mandate to this Court for a new trial on the issue of the sentence, which will include a jury determination of whether the death penalty is appropriate.

3. Rather than wait until such time as this Court receives the final directive from the Federal Court, this Court has determined that it will appoint qualified death penalty trial counsel now to

both commence preparation for the eventual return of this case to the trial court level, as well as engage in negotiations with the Owyhee County Prosecutor (and possibly with the Idaho Attorney General, if the Attorney General is still assisting the Owyhee County Prosecutor at the trial level) regarding reaching a possible settlement of the case.

Accordingly, this Court appoints Van Bishop, who has been qualified and listed in the Idaho Supreme Court list of qualified death penalty trial counsel, to serve as lead counsel at the trial level of the above-entitled cause. At such time as this case is actually returned to the Court for re-trial of the issue of sentence, and if at such time there is no settlement reached in this matter, the Court will consider appointing death penalty qualified co-counsel. Until such time, trial counsel is free to confer with the defendant's appellant counsel, Ellison Matthews, and Federal Public Defender Joan Fisher.

Mr. Bishop shall be compensated at the rate of $125.00 per hour.

At the present time, the Court anticipates the primary effort of lead trial counsel will be involved in negotiations with the prosecuting attorney to attempt to arrive at a possible settlement of this matter. Obviously, if no settlement is reached, the Court anticipates thereafter appointing a mitigation

specialist to assist the defense in preparation for the re-sentencing in this case.[1]

BE IT SO ORDERED this 23 day of October, 2006.

/s/ Gregory M. Culet
Gregory M. Culet District Judge

CERTFICATE [sic] OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was forwarded to the following persons on this 23rd of October, 2006.

Lawrence Wasden
Idaho Attorney General

L. LaMont Anderson
Chief, Capital Litigation Unit
Idaho Attorney General's Office
Criminal Division
P.O. Box 83720
Boise, Idaho 83720

Dennis Benjamin
Attorney at Law
P.O. Box 2772
Boise, Idaho 83701

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[1] It should further be noted, however, that depending on the outcome of all present appeals in the 9th Circuit, a re-sentencing trial may not be necessary.

Ellison Matthews
Attorney at Law
P.O. Box 1988
Boise, Idaho 83701

Joan Fisher
317 West Sixth Street, Suite 204
Moscow, Idaho 83843

Van Bishop
203 12th Ave. Rd. Suite B
Nampa, ID 83686

Matthew Faulks
Owyhee Co. Pros. Atty.
(placed in basket)

/s/ Trina Aman
Deputy Clerk